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THE URLAM WATER-CESS CASE.

(Kandukuri Balasurya Prasada Rao v. The Secretary of State for India : 33 M. L. J. 144.)

Out of the large mass of litigation that has arisen in this Presidency during the last decade, in consequence of the rigorous application, by the Government of a particular interpretation placed by them on the Madras Irrigation Cess Act, the present case was the first to reach the highest Court of Appeal and the decision has long been eagerly looked forward to, in the confident expectation that their Lordships will reverse the decision of the High Court based on what was felt at the time to be an untenable theory. The numerous reported decisions of the Madras High Court subsequent to that in the *Urlam case* [1], bear testimony to the difficulties and uncertainties that beset the construction and the application of the Act but they also disclose a strong body of Judicial opinion against the extreme view enunciated by the High Court in the Urlam case. We cannot help feeling that the decision of the Judicial Committee now before us does not altogether fulfil the expectations of the public and the profession as to the points likely to be settled thereby. Judging from the notes of the argument before them (so far as they are available to us) numerous questions seem to have been pressed upon their Lordships, but the decision is rested on a narrow ground and their Lordships do not even indicate the inclination of their opinion on certain interesting questions suggested in the judgment itself. But such, as it is, the decision is one of considerable importance to the Zemindaries in the Presidency, not merely because of its effect on the application of the Water-Cess Act but also on account of its bearing on the large question of the irrigation rights of Zemindars, which is likely to come up for discussion at an early date, in connection with the proposed Irrigation Bill of the Madras Government.

The principal questions that have arisen in connection with the Irrigation Cess Act may be conveniently grouped under the

1. (1910) I L R. 34 M. 295.

following heads: (1) whether the application of the Act is to be confined to cases indicated by the Preamble, *viz.*, those in which the irrigation takes place "from works constructed or improved by Government."

(2) If that is not to be the case, what is the meaning of the expression, river, stream, or channel *belonging* to Government, and

(3) What is the nature of the "Engagement" referred to in the proviso and how is the fact or the extent of such engagement to be established.

Other questions relating to the procedure under the Act such as, for instance, the period, within which the cess should if, at all, be imposed, (see for instance, *Zemindar of Nuzvid* v. *Secretary of State* [1]), the conditions which the Revenue Officers have to satisfy themselves about, before imposing a cess etc., have also formed the subject of Judicial discussion, but they may be left alone for the present.

On the first of the questions above stated, which may be conveniently described as the 'restrictive construction' of the Act Mr. Justice Sankaran Nair's view practically stands alone. The body of S. 1 of the Act is undeniably quite general and the Judicial Committee referring to the limitation inferable from the language of the Preamble expressly state that "this does not seem to be the effect of the first section," and they proceed to amplify that observation in a manner which leaves no doubt as to their opinion.

The second question may in turn be sub-divided somewhat as follows:—(*a*) what is the basis of Government ownership, and as a slightly different aspect of it, what is the subject of ownership, that is, whether the ownership contemplated by the Cess Act is the ownership of the *bed* or merely that of the *water* and this involves the further question whether and how far the one is separable from the other.

(*b*) What exactly is the peculiarity of the law in India or in the position of the State in India in respect of this matter.

(*c*) What is the true scope and effect of the declaration of State ownership of running and standing water &c., in S. 2 of Madras Act III of 1905, and how far can it be relied on in the interpretation of the Irrigation Cess Act.

(*d*) What is the effect of the commingling of water admittedly the subject of private ownership with water not shown to be such.

1. (1911) I. L. R. 35 M. 197.

Of these several points (*a*) and (*c*) were decided by the High Court in the Urlam case substantially to the following effect:—

That the ownership contemplated by the Act is that of the "body of water forming the river" and is independent of the ownership of the bed and that S. 2 of Act III of 1905 contains a declaration, relevent to the present purpose, vesting in the Government the property in all waters not belonging to any one else. On both these points later decisions of the High Court have not uniformly followed this view. Thus, to take a comparatively recent instance, in *Secretary of State* v. *Maharaja of Bobbili* [1], Wallis, C. J., held that Act III of 1905 was 'clearly intended by the Legislature to be used in the interpretation of Act VII of 1865, and on this point he purported to follow the decision of the Full Bench in *Secretary of State* v. *Janakiramayya* [2]. But he disagreed with the "extreme view" taken in the Urlam case as to the effect of Act III of 1905 and held that in a case in which "both banks and the whole bed at the place in question" belonged to a private owner and not to Government, the river would not be a Government stream within the meaning of Act VII of 1865. On this last mentioned point Seshagiri Aiyar, J, concurred but as to the application of Act III of 1905 his judgment contains no clear indication of his opinion. A different view as to the applicability of Act III of 1905 in the present connection will be found in the judgment of Abdur Rahim, J., in an even more recent case, (*Secretary of State* v. *Ambalavana Pandara Sannadhi* [3]), not to mention the opinion consistently maintained by Sankaran Nair, J. in his several decisions on this subject.

On the question of the connection between the ownership of the bed of the stream and that of the water, a further difficulty arises where one bank of the stream belongs to the Government and the other bank to a private owner. This is illustrated by the difference of opinion between Sadasiva Aiyar, J., on the one hand and Oldfield and Bakewell, JJ., on the other in *Secretary of State* v. *Janakiramayya* [1]. It may be pointed out in passing that in the last mentioned case Sadasiva Aiyar, J., regards the declaration in Act III of 1905 not as enunciating a doctrine of substantive law but rather as laying down a rule of evidence.

1. (1915) 30 M. L. J. 163. 2. (1915) 29 M. L. J. 389.
3. (1917) 33 M. L. J. 415.

With reference to sub-head (*b*), the principal arguments on behalf of Government are that the English doctrine of *running water* not being, as such, the subject of ownership should not be extended to India, nor the doctrine that the ownership of the bank of a stream carries a right of ownership in the bed *ad medium filum*. It has also been contended that the *Common law* right of the State in India to *control* irrigation is an argument against private ownership in respect of natural streams and has in any event an important bearing on the question of the right of the Government to levy a cess under Act VII of 1865. It can scarcely be said that these contentions have been definitely decided by the Madras High Court one way or the other; but they have been adverted to, now and then in the course of some of its judgments.

As to the question raised under sub-head (d) *supra*, the decision in *Secretary of State* v. *Swami Narathiswarar* [1], marks one point of view, see also *Secretary of State* v. *Ambalavana* [2]. But it may be worth while noting that it rests on the hypothesis that "Act VII of 1865 is not based upon any theory of the ownership of the bed of a bank or water-course being the foundation of a right to use the water free of charge." Some observations germane to this question and indicating certain necessary limitations to the claim based on the mixing up of water in a Government stream with that in a private source will be found in the judgment of Abdur Rahim, J. in *Secretary of State* v. *Ambalavana* [3].

We may now proceed to see whether and how far the several points above indicated as arising under the main head No. (2) are affected by any pronouncement of the Judicial Committee in the case under notice. The subject is adverted to in one paragraph of the judgment but even that rather mentions the difficulties and possibilities of the subject than helps to solve any. Their Lordships assume that under the English law the ownership of a river by the state, "would probably connote a Government ownership of the bed or the banks", but then go on to add that, "it is quite possible that the law of the Madras Presidency recognises some proprietary right on the part of Government in the water flowing in rivers and streams". They seem to recognise what may conveniently be described as the prerogative right of the State in India to control irrigation, but they do not evidently go the length of

1. (1910) I. L. R. 34 M. 21. 2. (1910) I. L. R. 34 M. 366.
3. (1917) 33 M. L. J. 415.

accepting the contention urged on behalf of Government that this itself is the kind of ownership that justifies the levy of a cess under Act VII of 1865. With reference to Act III of 1905 it does not appear that their Lordships accept the limited construction placed upon the declaration in S. 2 thereof by some of the Judges in Madras, *viz.*, that having regard to the main purpose of the Act it must be held to relate only to the ownership of the *land* forming the bed and not to the ownership of the *water* thereon. But they seem to feel grave doubts as to the propriety of relying on that declaration for the purpose of the interpretation or application of the Cess Act; for, as pointed out by them the true relation of the "natural and easement rights" saved in Act III of 1905 to the theoretical ownership of the Government therein declared will be "a nice problem", if the latter is to be made the basis of the right to levy a cess. Their Lordships' hesitation in deciding upon the applicability of English rules in this country is further illustrated by the observation in another part of the judgment where, dealing with the effect of the grant of the Zemindary on the ownership of the bed of a stream forming its boundary, they guardedly say, "*if* the principles of English law governing the grant of land bounded by a stream or river be applicable in the Madras Presidency," the grant would also comprise, "the river bed, *usque ad medium filum.*" They ultimately content themselves with holding that the effect of the permanent settlement was to vest in the Zemindar the channels within the Zemindary with the head sluices, where they are also situated within the Zemindary limit. We may observe in passing that even this limited conclusion and the inference drawn therefrom as to the water rights possessed by the Zemindar, substantially overrules the view of the majority in *Secretary of State for India* v. *Janakiramayya* [1].

The third question of "engagement," arising under the first proviso to S. 1 of Act VII of 1865 has proved no simpler than the points discussed *supra*. In view of numerous decisions on the point it will scarcely be right to understand that term as connoting something in the nature of a *contract* even allowing for a wide application of the theory of 'implied' contract. In his judgment in *Zemindar of Kapileswaram* v. *Secretary of State* [2], Sankaran Nair J. attempts to trace the origin of the use of the term, 'engagement'

1. (1916) 29 M. L. J. 389. 2. (1913) I. L. R. 37 M. 355.

in connection with the subject of water-cess. But we venture to think that it would be scarcely safe to limit the connotation of that term as used in the Act by reference to the correspondence adverted to by the learned Judge. The questions for consideration under this head may be roughly classified as hereunder: (a) the circumstances from which an engagement may be implied,

(*b*) the extent of the engagement in each particular case, and

(*c*) the relation of private rights to *take water* (whether natural or prescriptive, whether acquired by grant or otherwise) to the theory of '*engagement*' which alone will under the Act secure exemption from payment of cess.

It will be obvious that points (a) and (*b*) *supra* are substantially questions of fact likely to vary with the circumstances of each case. But there are certain general considerations that have weighed with the Courts in India in dealing with these questions and they may be briefly adverted to, here. The extreme contention has sometimes been put forward on behalf of Government that, an engagement, to come within the Act, must be not merely an engagement to supply water, but one to do so free of charge. This has not found any general acceptance and the observations of the Privy Council, to be presently noticed, practically set this point at rest. The Government have generally conceded that the permanent settlement in the case of Zemindaris and the Inam Settlement in the case of Inams, constitute an engagement within the meaning of the Act and the principal controversy under this head has been as to the *extent* of the rights secured by such engagement. But several cases have arisen not falling under one or the other of these heads, in which the question was whether an engagement could be implied for the purpose of the Act from decrees or other transactions securing certain water rights to private parties as against the Government. This matter can conveniently be dealt with under the third sub-head.

On the question of the *extent* of the engagement to be implied from the Permanent Settlement or the Inam Settlement, the contention of the Government which has in the majority of cases found acceptance with the Madras High Court, may be said to be embodied in their well-known theory of Mamul wet, i.e., that it is limited to the area cultivated as wet, at the time of the settlement. It is on this point that the decision of the Privy Council in the case under notice has a substantial bearing.

Turning now to the judgment of the Privy Council, it is clear that as to the nature of the engagement required by the Act, their Lordships refuse to accept the contention that there must be an express contract that the supply 'should be free from anything in the nature of a future tax'. But their further observations on the point are not quite easy to follow. The practical result however of their Lordships' view is, as stated in another part of the judgment this, *viz.*, "that to the extent to which the right to take and use water from a Government source is, "part of or appurtenant to the property in respect of which he (the Zemindar) pays a single jumma or peishcush, no cess can be levied under the Act in respect of, the water which he is so entitled to take and use." This statement can be applied only to cases of Zemindars and even there, it only transfers the difficulty of the problem from the first step to the second.

In determining the extent of rights accruing to the Zemindar under the Permanent Settlement many of the Madras Cases have proceeded on far too narrow a ground, by confining their attention to the terms of the sanad. And one view almost consistently enforced by the Madras High Court in this connection is that the grant under the sanad is to be construed as referring only to the items of revenue actually accruing at the time and as such, taken into account in fixing the assessment. On both these points the Judicial Committee lay down a more liberal rule. The true effect of the settlement or the grant, they seek to gather, from the terms of the grant, "taken in connection with the circumstances existing when it was made". They recognise that the Kabuliyat "does not mention any water rights. It does not even refer to the existence of main or branch or subsidiary channels or of tanks or reservoirs in the several villages." But this does not deter them from holding not merely that the channels etc. in the Zemindari became vested in the Zemindar by virtue of the settlement but also that, as a result thereof, the Zemindar obtained a right to take water by those channels, limited only by the physical conditions of the channel, weir, etc. and not by the purposes for which, or the extent to which, the water has been used prior to the date of the grant. Their Lordships take full account of the policy and objects of the Permanent Settlement and the intention of Government gatherable from the nature and circumstances of the grant, that the water available from the irrigation system thus

granted, "should be used to the utmost extent for the purpose of improving the estates and increasing the population or wealth of the district." They also point out the anomaly of the view adopted by the High Court that "though the channels, branch channels and works constituting the irrigation system were included in the grant no right to use such system passed at all." This last observation, though mixed up with the question of the interpretation of the engagement, sounds as if their Lordships were not prepared to give their approval to the theory that would altogether divorce the right to the use of the water in a channel from the ownership of the channel and its accessory works. In ascertaining the extent of the grant, the Judicial Committee emphasise the distinction between cases in which a grant of land is made *with* the channels passing thereon and those in which the land alone is granted *reserving* the channel. It is only in the latter case that the principle of continuous and apparent easements will come into play and the right of the grantee will be limited by the extent of user at the time of the grant. In the former case, on the other hand, the grantee's right would be measured by the capacity of the channel and so long as he is within that limit, the grantor has nothing to do with the use to which the grantee may put the water. This distinction would furnish a basis for reconciling some of the Indian decisions which at first sight may seem conflicting; but there can be no doubt that their Lordships' decision on this point substantially reverses the theory hitherto generally applied by the Madras High Court.

As to the argument based on the elements that entered into the calculation of the permanent assessments their Lordships clearly point out its fallacy and answer it saying that, "the property taken into account in arriving at the Jamma is by no means necessarily the same as the property upon which the Jamma is chargeable and all that is chargeable with the jamma is included in the grant." They also draw attention to the probability that in fixing the peischush at the time of the permanent settlement the officers of Government would have taken into account the possibility of improving cultivation by means of the irrigation system comprised in the grant. These considerations will, as pointed out at the outset of this article, have a material bearing on the principles underlying some of the provisions in the proposed Irrigation Bill of the Madras Government. To say

the least, it will be difficult to reconcile the extent of irrigation rights herein recognised in favour of Zemindars, with the clauses of the bill that seem practically to limit their rights by their user at a particular time.

Before taking leave of this subject it has to be pointed out that the line of reasoning adopted by their Lordships does not furnish sufficient guidance for the determination of cases not covered by a permanent settlement sanad, nor in fact even of all cases of permanent settlements. It is clear that the configuration of the lands granted, their situation in relation to the river constituting the source of supply and the nature and conditions of the supply channels including their relation to lands other than those comprised in the grant will be important elements in determining the extent of rights granted in each particular case. The position of Inamdars will thus necessarily be one of great uncertainty. The decision would be useful in such cases only in so far as it overrules the mamul wet theory as a rule of general applicability.

Coming now to the only remaining question, we cannot help regretting that their Lordships, while realising some at least of the problems arising in connection with the relation between (1) limited rights of private owners to take water from a Government stream and (2) the liability to pay cess even in respect of such user afford no light to help us in solving such problems. The contention on behalf of Government has generally been that sort of the 'engagement' referred to in the Act, the existence of a right to take or use water from a Government source will not exempt the person so taking or using it from liability to pay cess. Decisions of the Madras High Court have held that where by grant or prescription or by any other arrangement or by decree of Court, a person has an absolute right to a specific share or quantity of water out of a larger whole he should not be charged water-cess in respect of any user that he may make out of that share or quantity. See *Venkatasimhadri* v. *Secretary of State* [1] and the cases there referred to. It will be noticed that such fractional right will not prevent the stream or other source being a Government source within the meaning of the Act and the obvious injustice of levying water cess in such a case can be avoided only by bringing into operation the proviso to S. 1 and

1. (1914) I L. R. 39 M. 67.

implying an engagement, though there may be no foundation, in fact, for such an implication. It will also be seen that such a case will be an exception to the rule stated in some of the decisions, that the mixing of Government water with that in a private source or supply, will infect the whole as it were, making it a Government source. But where there is no right of ownership in the water but a right as against the Government to a supply of water whether by way of easement or otherwise, the question presents some difficulties. In an earlier stage of the case of *Secretary of State* v. *Maharaja of Bobbili* [1], Sir Arnold White, C.J. and Oldfield, J. held that even in cases in which Government may be under an obligation to supply water for the irrigation of particular lands, "it does not follow that Government are not entitled to levy a tax for the use of the water." In that case the obligation arose from certain transactions between the private owner and the predecessor in title of the Government, who was the owner of a neighbouring Zemindari, since forfeited to Government. The generality of the view thus enunciated cannot, it seems to us, be maintained in view of the manner in which the decision of the Judicial Committee deals with the circumstance of the acquisition by Government of some of the Zemindaries originally granted along with Urlam. Their Lordships seem to be clearly of opinion that if prior to such acquisition the Cess Act could not have been applied, "the accident" of such acquisition can make no difference.

SUMMARY OF ENGLISH CASES.

In re **Suarez. Suarez** *v.* **Suarez,** (1917) 2 Ch, 131.

International Law—Foreign Ambassador—Submission to jurisdiction of local courts down to judgment in a cause—Writ of sequestration—Claim of privilege—Diplomatic Privileges Act 1708 (7 Anne, C. 13).

A foreign Ambassador resident in England is entitled to complete immunity from the jurisdiction of the local courts except in cases in which he submits to or invites the jurisdiction. But an Ambassador submitting to the jurisdiction of the court down to the judgment in a cause, can, even when an order working out the

1. (1915) 30 M. L. J. 163.

judgment has been made determining his liability to pay, assert his immunity from process by way of execution and set up the statute of Anne as an answer to an application for leave to issue execution.

In re **Fried Krupp Action Gesellchaft**: (1917) 2 Ch. 188.

Foreign Law—Recognition of, by British Courts—Contract between German subject and persons residing in Great Britain, not being enemies—German ordinance prohibiting payment of interest on debts due to enemy.

Sometime after the declaration of war between Great Britain and Germany, a German ordinance was passed forbidding transmission of funds to Great Britain and Ireland and providing that the date for satisfaction of claims relating to property in favour of persons or corporate bodies having their domicile or place of business in those areas was to be deemed postponed till further notice. It was also laid down that no interest could be claimed in respect of the period during which the postponement continued.

Held, in construing a contract between a German subject and a person resident in England, though it was common ground between the parties that their rights were to be regulated by German law, that the ordinance was not part of the ordinary German law, and, so far as it cancelled the liability for interest, would not be recognised by English Courts. Even if such an ordinance were treated as part of that law, no such essentially one-sided development of that system could have been within the contemplation of either party to the contract at the time when they entered it and agreed that their rights thereunder were to be regulated by German law. Further, the German ordinance with its marked bias in favour of German nationals against British subjects could cast no disability upon a person against whom its provisions are directed.

Burch *v.* **Farrows Bank Limited**, 1917, 1 Ch. 606.

Lessor and lessee—Lease for a term of years—covenants for repairs by Lessee—Power given to Lessee to determine Lease—Breach of covenant—Notice to Lessor to determine Lease—Repairs commenced shortly before and completed shortly after the date for the determination of the Lease—Condition precedent—Notice, effect of.

A lease for 21 years contained the usual covenants to repair and to keep and deliver up in good and tenantable condition the premises, with a proviso that "if the Lessee should desire to determine his lease at the expiration of the first three, seven, or fourteen years of the term thereby granted and of such desire shall give to the lessor six calendar months' previous notice in writing and pay all the rent and perform all the covenants herein before reserved and contained............, this lease shall absolutely cease and determine, but without prejudice to the remedies of either of the parties hereto against the other in respect of any antecedent claim or breach of covenant." In pursuance of this proviso, the lessee gave the lessor a six months' notice to determine the lease at the end of the seventh year, but possession was not given him on that date. The premises were at that time, in the occupation of an under-tenant of the lessee. The lessee commenced repairs shortly before, and completed only shortly after, that date. In an action by the lessor to declare that the notice was invalid and the lease existing on the allegation that the lessee continued in possession after the expiry of the term specified in the notice and had failed to perform the repairing covenants prior to that date:

Held, that the language used made the performance of all the covenants a condition precedent to the determination of the term; that words such as "without prejudice, etc." reserving a right on the part of the landlord to sue notwithstanding the determination of the term were not sufficient to modify the meaning of words creating the condition; and that the condition not having been fulfilled, the notice was invalid and the lease had not determined.

Grey v. *Friar* (1854) 4 H. L. C. 565 followed.

Lee *v.* **Rayson**, 1917, 1 Ch. 613.

Rescission—Contract — Vendor and purchaser — Freehold ground rents—Existing tenancies — Misdescription—Mis-statement or error in the description of the premises—Substantial or material.

By an agreement in writing a vendor agreed to sell and a purchaser agreed to purchase thirteen free-hold houses let on six leases for a term of ninety-nine years at rents amounting in the aggregate to 72£ per annum. In the contract one pair of houses was described as let at 11£. 10s. per annum; each of the next four pairs at 11£ per annum; and the last three houses at

16£ 10s. per annum. But from the abstract of title it appeared that a title was deduced to twelve ground rents of 5£ 10s. each, and one of 6 £ each rent issuing only out of, and secured by, one of the thirteen houses, instead of the six rents mentioned in the agreement. There was a provision, however, in the agreement to the effect that "if there be any mis-statement or error in the description of the premises, no compensation should be allowed, nor should the same annul the sale."

In an action by the purchaser to rescind the contract on the ground of misdescription, *held,* that the property agreed to be sold was substantially different from that which the vendor offered to convey; and the purchaser was entitled to rescission.

"In deciding whether the purchaser is getting substantially that which he bargained for, the court is bound to consider every incident by which the property offered to be assured can be differentiated from that contracted for the sum of these incidents really alters the subject-matter, then the purchaser can repudiate the contract ; if, on the other hand, the subject matter remains unaffected, or so little affected as to be substantially that which was agreed to be sold, then the purchaser must be held to his contract."

In re **National Live Stock Insurance Co. Ltd.,** *In re* **National General Insurance Co. Ltd.,** 1917 Ch. D. Vol. 1, p. 628.

Administration—Two insolvent companies—Winding up—Cross-claims—Each company to clear up its debt to the other before claiming for a share in assets—Liquidator at liberty to distribute assets among creditors of each company other than the Debtor Company.

Two companies were in liquidation. The plaintiff company was indebted to the other in 31,250£ for balance of accounts and money but the Deft. Company was itself indebted to the Plff. Company in 28,325£ for arrears of calls. The Plff. Co., sought to distribute the sum of about 4000£ in its hands by way of first interim dividend amongst its creditors other than the Deft. Co. According to the evidence of the liquidator (who was the same person for both companies), the assets and liabilities of each company were such that there was no prospect of more than a few shillings in the pound being paid by way of dividend amongst the creditors of either Company, and consequently, if each company

was first bound to satisfy in full the amount of its indebtedness to the other, there was no prospect of either company becoming entitled to receive a cash dividend in the liquidation of the other.

Held, that neither company was in a position to receive any cash dividend in the winding up of the other; and that the liquidator should be left at liberty to distribute its available assets in payment of dividends to the creditors other than the debtor companies.

In re *Rhodesia Goldfields,* (1910) 1 Ch. 239 referred to and followed.

Hopkinson *v.* Mortimer Harley and Co. Ltd. 1917, 1 Ch. 646.

Company—Articles—Resolution for alteration of an Article—Validity of — Lien to be created on fully paid deferred shares—Forfeiture for debts—Power ultra vires—Illegal reduction of the capital—Clog on—Equity of Redemption.

The plaintiff was a holder of 100 fully paid deferred shares in a company. According to Art. 22 of the Articles of Association of a company, it had a first lien upon all the shares "other than fully paid shares," of a member for debts, liabilities and engagements of such member. A special resolution was brought in an extraordinary general meeting to the effect that the words "other than fully paid shares" should be struck out from that article. The effect of this alteration would be to create in favour of the company a first lien on *all* the shares. Art. 23 provided that the Board of Directors might sell the shares for the purpose of enforcing the lien and might alone by a resolution to that effect, forfeit the shares subject to such lien. The Plaintiff requested the Directors by a letter to abandon the special resolution and on their refusal to comply be issued his writ. The Directors nevertheless held the meeting and passed the resolution. The Plff. claimed a declaration that the resolution passed by the Directors was ultra vires and illegal and that fully paid shares were not liable to ferfeiture for debts though there had been no threat to forfeit the Plff's. shares.

Held, (1) That the Plff. was not premature in coming to the Court as his rights had already been invaded and his property damaged.

(2) That under this power the ferfeiture for debts due from a member generally, as distinct from those due from him as a contributory, would amount to an illegal reduction of capital.

(3) That the lien was an equitable charge in the nature of a mortgage and therefore the power to ferfeit the plaintiff's shares on his failure to reedem on a seven days' notice was a clog on the Equity of Redemption and as such invalid and ultra vires.

(4) That the Plff. was therefore entitled to the declaration.

Fowler v. Midland Electric Co-operation for Power distribution Ltd. 1917, 1 Ch. 656.

Company—Debenture—Payment off—No place fixed for payment in the debenture—Death of Debenture-holder—Executor delay in registration of probate immaterial—No legal tender—Company liable for interest up to date of payment.

A certain lady was entitled to certain debentures, the principal sum with a premium being made payable on June 30, 1913. A condition in the debentures stated that in the event of the death of the registered holder of any debenture, his executor or administrator should be the only person entitled to payment. The lady was the registered holder of these debentures. She died before June 30, 1913 and the cheque for interest warrant for half-year ending June 30 was returned with that information. Then, one of the executors about whom information was given by the bank was applied to, but he said he had renounced the executorship, gave the name of the other executor who did prove; Nothing more happened; no communication whatever was made by the company to the other person. The principal money and premium were not then paid. In June 1916 that person, the present plaintiff brought this action for the principal and premium with interest up to date of payment.

Held, that, no particular place for payment was specified in the debenture, it was the duty of the company to seek the debenture-holder and make legal tender of the amount on the due date without request, and that, where no such tender had been made the debenture-holder was entitled to recover from the company interest on the principal moneys thereby secured up to the actual date of payment.

Panoutsos v. Raymond Hadley Corporation of New York: (1917) 1 K B 767.

Contract for sale and delivery of goods by instalments —Condition as to payment—Breach of—Waiver by seller—Effect —Right to cancel contract on ground of breach—Reasonable notice to buyer—Necessity.

Where a contract for the sale and shipment of flour to be shipped to Greece provided that "each shipment shall be deemed a separate contract" and that payment should be "by confirmed banker's credit," and the question arose as to whether the sellers under the contract had, by acting upon a credit opened not in accordance with the contract, which they might have refused if so minded, with knowledge of the fact that the credit was not in accordance with the contract waived their right to cancel the contract upon the ground that it was not the contractual credit, *held* that, though the sellers must, by their conduct, be taken to have waived the informality so long as they chose to act upon that credit, still they were not bound to act upon its right up to the end of the contract; that they were entitled at any time to insist upon the credit being in order; but that they could not cancel the contract on the ground of the credit not being in order without giving reasonable notice to the other party of their intention to do so.

Sharp Brothers and Knight *v.* **Chant**: (1917) 1 K. B. 771 C. A.

Statute having retrospective operation — Interpretation— Principles.

A statute is not to be construed so as to have a greater retrospective operation than its language renders necessary.

Price *v.* **Guestkeen and Nettlefolds, Ld**: (1917) 1 K. B. 780 C. A.

Employment—Continuous employment—What is—Contract of service—Termination—Incapacity to work of servant—Voluntary absence of servant—Effect—Contract—Breach of, if puts an end to contract.

Per Lord Cozens-Hardy, M. R.—Employment for three years by the same employer is substantially continuous employment.

An employment may be continuous although wages may be increased or diminished, and the conditions of service as to notice and otherwise may be varied. A contract of service is not at Common Law terminated by incapacity to work by reason of temporary illness.

A contract of service is not terminated by voluntary absence, although such absence may be a sufficient justification for a discharge.

In the absence of notice by either master or servant, there must be some act inconsistent with the continued existence of the relation of master and servant for example, going to work to another master.

Per A. T. Lawrence, J.:—The breach of a contract does not *ipso facto* put an end to the contract; it gives a cause of action, and it may give a right to the other side to put an end to the contract; whether it does so will depend upon the facts of the particular case.

Shaw & Co. *v.* Symmons & Sons: (1917) 1 K. B. 799.

Book-binding—Contract to bind books and deliver—No time specified for delivery—Binder's duty to deliver within reasonable time after order for delivery of bound books—Breach of—Destruction of books by accidental fire—Damages for loss of books—Liability of binder.

A book-binder to whom books are entrusted to be bound under a contract to deliver them when bound, no time, however, being specified for delivery, is bound to deliver within a reasonable time after the order for delivery of bound books. If he neglects to deliver within that time and the books are destroyed while in his custody by a fire on his premises which is accidental and not due to any negligence on his part, he is liable in damages for the loss of the books on the principle that a wrongdoer cannot be allowed to apportion or qualify his own wrong and that when sued for damages for a loss which has actually happened whilst his wrongful act was in operation and force and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done.

Hulton *v.* Hulton: (1917) 1 K. B. 813 C. A.

*Tort—Action for—What is—Proceedings seeking for rescission of contract on ground of fraud not an action for tort—Rescission of contract—*Restitutio in integrum—*Practice of Court of Equity.*

An action for a tort means an action complaining of a tort independently of contract and asking for damages following from such a tort. A proceeding which asks for rescission on the ground of fraud in connexion with the making of a contract is not such an action.

The practice has always been for a Court of Equity to give relief by way of rescission whenever by the exercise of its powers it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract.

Rex *v.* **Westminster Unions Assessment Committee : Woodward and Sons, Ex parte** : (1917) 1 K. B. 832.

Statute—Interpretation—Principles—Hardship or injustice likely to result from an interpretation—Considerations of, when admissible.

Per Viscount Reading, C. J. :—If the wording of a statute is ambiguous, and if it is possible for the Court to give it a fair and ordinary meaning which will avoid all hardship and injustice, the Court would choose that construction ; but the Court is not entitled, merely because it thinks they might create possible injustice or injury, to alter the words of an Act of Parliament.

Rex *v.* **Governor of Lewes Prison.** (1917) 2 K. B. 254.

Criminal Law—Conviction—Defect in commitment—Duty of Court—' Open court,' meaning of—Inherent power of court to exclude public from trial.

In a case of commitment after conviction, even though the warrant of commitment was bad on the face of it the Court is not only entitled but bound to look at the conviction in order to see whether there is more than a technical defect in the commitment. A good conviction will cure a defect in the commitment.

The words "open court" mean a court to which the public have a right to be admitted, but they do not include a court where the public are excluded although the accused and his representatives are allowed to be present. There is inherent jurisdiction in every court, including a field general courtmartial, to exclude the public from a trial if it is necessary for the administration of justice.

Goldstein *v.* **Salvation Army Assurance Society,** (1917) 2 K. B. 291.

Death—Funeral expenses—Cost of tomb-stone — Premia paid on a policy, when liable to be returned.

Funeral expenses could not be taken as a matter of law to exclude the cost of a tomb-stone, and whether in a particular case they properly include such an item is a question of fact.

The premia paid on a policy of insurance are liable to be returned by the insurer only if he has not been on the risk; it is returned on the footing of money paid for a consideration which has entirely failed.

JOTTINGS AND CUTTINGS.

Jane Austen and the Law:—Although the novels of Jane Austen—in whose centenary celebration a distinguished lawyer has played a leading part—contain no legal types comparable to Mr. Pleydell in 'Guy Mannering,' Mr. Jaggers in 'Great Expectations', or Mr. Wakem in 'The Mill on the Floss', yes, apart from clergymen, lawyers are almost the only professional men who do appear in them. They are, it is true, so thinly sketched as to be scarcely recognisable. The authoress of 'Pride and Prejudice,' with all her extraordinary skill in portraiture, did not, like other great 'character-mongers' in English fiction, realise that character is moulded by occupation. Even her clergymen, with the exception of the immortal Mr. Collins, who has an unwonted touch of caricature, have few of the distinctive marks of their calling. So slight is the professional touch in Jane Austen's lawyers that she does not even make it clear whether John Knightley in 'Emma' is a barrister or an attorney, though an allusion to his return to London in time for the reopening of the courts in November, after he had spent the Long Vacation in the country, suggests that this 'tall, gentlemanlike, and very clever man, rising in his profession,' was a member of the 'higher' branch of the profession. Another lawyer in the same novel is dismissed by Emma, in contemplating Harriet's possible suitors, as a 'pert young lawyer,' and one feels instinctively that Mr. William Coxe would not have been so described had he been a member of the Bar. Even the most exclusive of Jane Austen's creations recognised that the Bar was a genteel calling. This is how Edward Ferrars, in 'sense and sensibility,' explains to Mrs. Dashwood that "a young man of eighteen is not in general so earnestly bent on being busy as to resist the solicitation of his friends to do nothing."

I always preferred the church, as I do now. But that was not smart enough for my family. They recommended the Army. That was a great deal too smart for me. The Law was allowed to be genteel enough; many young men who had chambers in the temple, made a very good appearance in the first circles, and drove

about town in very knowing gigs. But I had no inclination for the law, even in this less abstruse study of it, which my family approved.

Not, however, that Jane Austen displays any hostile feeling towards the attorney. On the contrary, Mr. Shepherd, who is described as a 'civil, cautious lawyer,' is one of the most agreeable and level-headed of the male characters in 'Persuasion', and manages the affairs of Sir Walter Eliot, to say nothing of the vain baronet himself, with exemplary skill. And, let it be remembered by the members of the other branch of the profession, William Eliot, who is the nearest approach to a scoundrel in all Jane Austen's books, was if not actually a member of the Bar, a student at one of the Inns. As a young man he had chambers in the Temple, but even at that period of his life, we are told, he had determined to make his fortune by a rather quicker process than the law, and that was by marrying a rich woman of inferior birth. These, of course, are very slight figures in the long gallery of fictitious lawyers, and they are hardly likely to have afforded Sir Frederick Pollock any professional material for the address he delivered in unveiling the memorial tablet which has been placed on Jane Austen's cottage at Chowton. But, all the same, it is not unfitting or ungratifying to remember that the pages of the great English woman novelist, in which so few professions and trades are mentioned, do contain these slender pieces of legal portraiture :—*Law Journal, 21st July, 1917.*

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Magistrate and Poet:—Here is an extract from a poem of r. Horace Smith which will interest the junior members of the Profession in this country also :—

Three attorneys went sailing down Chancery Lane,
  Down Chancery Lane ere the Courts had sat,
They thought of the leaders they ought to retain,
  But the junior Bar, oh, they thought not of that;
For Serjeants get work and Q. C.'s too,
  And Solicitors' sons-in-law frequently do,
While the Junior Bar is moaning. *Ibid.*

CONTEMPORARY LEGAL LITERATURE.

The Law Quarterly Review for July, publishes the Rhodesian Lecture by Professor J. H. Morgan on *the War and the Empire*. In that he seems to have anticipated some of the conclusions of the War Council, for instance as to the claims of India to admission to the Imperial Council and the inviolability of the dominion autonomy n any scheme of Imperial union. The existence of dependencies, he thinks, precludes the possibility of a Federal Legislative Council wielding control over the British Empire. The standard of the mother-country in the administration especially where the rights of the African natives and the Indians are concerned is much higher than that of the Colonies and therefore he is of opinion that the control over them must continue in the mother-country. In preference therefore to an *Imperial* Federal Legislative Council, he would suggest a Federal Executive Councll. It is pleasing to note that the Professor recognises the service of India and presses for a larger recognition of the position of Indians as citizens of British Empire. Referring to the drastic Aliens Act which is on the Statute Book he says " the problem before us is this, to be certain, while we narrow the privileges of the alien we should take care that we do not contract the rights of the British subject above all of those British subjects of Oriental descent who have laid down their lives at our call."

Mr. Charles Sweet examines the *restraints on alienation* that may be imposed under the law. The general principle is that if land is conveyed to a person in fee subject to a condition that he shall not alienate it to any one, the condition is void. As a result of this rule, a limitation or gift over or proviso of cesser to take effect on alienation by a tenant in fee simple is void.

Mr. Sweet combats the statement in Lewin that a person may give real or personal estate absolutely with a limitation over on alienation within a limited period and shows that it is really not supported by the authorities cited which only go to show that a life-estate can be so made to determine. The only exception is that allowed in the case of marriage settlement where estates are created in favour of the intended husband in fee until marriage, but afterwards to the uses of the settlement. This, he says, is really not an exception for according to him, the rule is not based on any doctrine of repugnancy but really on public policy. Provision

for children is a lawful object and is not within the mischief of the rule. Restraint against alienation in favour of particular persons also is not within the mischief of the rule and alienation of a particular estate like estate for years can always be restrained. In the case of contingent interests also, it is permitted to provide against their alienation before their vesting. In some cases, such a restraint in the case of vested reversionary estates in the property before the estate falls into possession has been upheld but these cases were decided on the analogy of life-estates and seem to be not supportable on principle. Restraints are similarly recognised where they are imposed for a collateral purpose, such as in mortgages, or where an option of purchase or pre-emption is reserved. Similarly the old practice of conveying land to A subject to the condition of his conveying it to B. There the object is not to make the land inalienable but to ensure that it is forthwith conveyed to B which is a lawful object.

In another article of interest Professor Oppenheim questions the correctness of Professor Morgan's statement that the conception of *war treason* as it is called is an importation from Germany and shows that it was recognised by the United States Government and the French authorities long before it came into vogue in Germany. The idea involved is that the resident of an occupied territory owes a duty to the invader not to assist the other side, even though the other side might happen to be their own State to which they owe allegiance and for the violation of such a duty death-penalty might be imposed.

In the Canadian Law Times for June, Mr. Joseph Donovan attempts to establish that a present sale of future goods operates merely as a contract to sell and has not the effect like a mortgage of future goods, of giving priority to the transferee over an execution purchaser of the goods.